(10)

No. 97-428



IN THE
# Supreme Court of the United States

OCTOBER TERM, 1997

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AIR LINE PILOTS ASSOCIATION,

*Petitioner,*

*v.*

ROBERT A. MILLER, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENTS

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Must nonmembers exhaust nonconsensual "arbitration" procedures adopted by a union before they can obtain a judicial determination of the lawfulness of the amount of the "agency fee" they must, under federal law, pay the union to keep their jobs?

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## BRIEF FOR RESPONDENTS

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions the Brief for Petitioner ("ALPA's Br.") at 2-3 quotes, this case involves Article III of the Constitution of the United States and sections 2, Fourth and Fifth of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, Fourth and Fifth (1988). Their pertinent text is set out in the Appendix, *infra*, 1a.

## COUNTERSTATEMENT OF THE CASE

This is an action for declaratory, injunctive, and monetary relief concerning collective-bargaining agreement provisions that, under section 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh (1988), compel nonunion pilots to pay "agency shop" charges to Petitioner Air Line Pilots Association ("ALPA") for its costs of statutory exclusive representation.

ALPA is a labor organization and exclusive bargaining representative for the pilots employed by Delta Airlines, Inc. ("Delta"). Respondents are 153 nonunion Delta pilots ("the pilots" or "the nonmembers"). (Pet. App. at 1a-2a.)[1] On November 1, 1991, ALPA and Delta entered into an agency-shop agreement requiring "as a condition of continued employment" that, beginning January 1, 1992, each pilot not a member of ALPA must pay the union "a service charge as a contribution for the administration of [the collective-bargaining] Agreement and the representation of such employee." The agreement specifies that the "service charge shall be an amount equal to the Association's regular and usual dues." (J.A. at 30-31, 35.)

The pilots filed their Complaint in the United States District Court for the District of Columbia on December 12, 1991, with a motion for a preliminary injunction against implementation of the agreement. The court denied this motion, and ALPA began collecting agency fees in January 1992. (*See id.* at 1.)

ALPA charged objecting nonmembers fees that were about 8% less than dues from January 1 through June 30, and about 17% less from July 1 through December 31, 1992, based, respectively, on its 1990 and 1991 expenditures. (Pet. App. at 2a.) Under its "Policies and Procedures Applicable to Agency Fees," ALPA did not escrow the full amount of objectors' fees, but only "an amount equal to 1.5 times ALPA's estimate of its total agency fee rebate obligation for that year." (J.A. at 67-68.)

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[1] Three Respondents, Robert A. Miller, Kenneth Shackelford, and Robert V. Ziminsky, were named Plaintiffs in the original Complaint. (J.A. at 10.) The other 150 were permitted to intervene later by the district court, (*id.* at 115-33), after ALPA opposed and the court denied class certification, (R. 46; R. 59) ("R." refers to docket numbers on the district court's docket sheet). One Respondent is the personal representative of a deceased Intervenor. (J.A. at 7.)



Two counts of the Complaint are pertinent here. The Sixth Count alleges that "ALPA's agency fee procedure is not in compliance with the procedures required by the decisions of the United States Courts." (*Id.* at 25.) The Seventh alleges that ALPA unlawfully "collect[s] from non-union pilots . . . monies for certain activities not germaine [*sic*] to collective bargaining." (*Id.* at 26-27.) ALPA's Answer admits that some of ALPA's "activities and expenditures are not germane to collective bargaining." (*Id.* at 38.) However, it denies that either ALPA's agency-fee procedure or the amount collected is unlawful. (*See id.* at 42-43.)

The pilots requested production of the files ALPA used in determining its germane and nongermane expenses for the fees charged in 1992, documents identifying its expenditure categories used in that determination and the activities under each category, and any guidelines used in establishing those categories and allocating expenses to them. ALPA objected to these requests. The Magistrate overseeing discovery denied the pilots' motion to compel production, because it was filed after a discovery deadline set earlier by the district court. (R. 40; R. 52.) The pilots timely objected to the Magistrate's order and moved to reopen discovery. (R. 53; R. 55.)

On August 2, 1993, the court granted ALPA summary judgment on four claims not relevant here. The court otherwise denied the parties' cross-motions for summary judgment "without prejudice to renewal." (Pet. App. at 62a-70a.) Simultaneously, it permitted the pilots to amend their Complaint to more specifically allege that ALPA's agency-fee procedures and amounts are unlawful and a claim for refund, with interest, of all monies collected unlawfully. (J.A. at 45-48.) The court also reopened discovery. (R. 58.) However, it never ruled on the objections to the Magistrate's order denying the pilots' Motion to Compel Production of Documents.

Meanwhile, on about July 23, 1993, ALPA sent the pilots its "1992 Statement of Germane and Nongermane Expenditures"

("SGNE"). (Pet. App. at 118a-57a; J.A. at 63, ¶ 2.) According to the SGNE, ALPA determined that 19% of its actual 1992 expenses was nongermane. (Pet. App. at 120a.) Under ALPA's "Policies and Procedures Applicable to Agency Fees," nonmember pilots who submitted objections to their 1992 fees then received an additional credit or rebate to bring their total reductions or rebates for the year to 19%. (*See* J.A. at 68-69.)

The "Policies and Procedures" provide that "[a]ny pilot who believes that ALPA has made an error in its appliction to him/her of the[se] policies and procedures . . . may request that his/her complaint be submitted to an independent arbitrator for hearing and decision." When a nonmember submits such a request, ALPA places "in escrow, pending the outcome of the arbitration, the portion of the pilot's agency fee that ALPA determines to be reasonably in dispute," not the entire disputed fee. (*Id.* at 69.)

A request for "arbitration" concerning ALPA's determination of the final 1992 reduction had to be sent to ALPA within thirty days of the SGNE's mailing, plus "a reasonable additional time for receipt." (*Id.* at 69, 79.) One hundred and seventy-four nonunion pilots, including the original Plaintiffs, submitted what ALPA considered requests for "arbitration" under its procedures. However, the Plaintiffs' letters objected to the "arbitration procedure" and "denial of Court review." They also stated that they were "sent to preserve my rights and without waiver of benefits I may have from" this litigation. (*Id.* at 71-78.)

Under ALPA's "Policies and Procedures," the American Arbitration Association ("AAA") appointed Louis Aronin as "arbitrator." (*Id.* at 69, 82.) The pilots' attorney asked the AAA not to proceed, because the matter was in litigation. (*Id.* at 95-97, 100-02.) Aronin rejected this request. (*Id.* at 105-06.) When the court subsequently denied the pilots' Motion for Preliminary Injunction against the "arbitration," (*id.* at 111-14), their counsel participated in the "arbitration" for the Plaintiffs and other pilots



who by that time had moved to intervene in this action. However, he entered only a "conditional appearance." (*Id.* at 134-35.)

The "arbitration" was conducted under the AAA's "Rules for Impartial Determination of Union Fees." (*Id.* at 69, 82.) Those rules "apply subject to . . . the internal procedures of the union." (*Id.* at 88, ¶ 1.) Under those rules, the AAA appoints "an arbitrator from a special panel of arbitrators experienced in employment relations." (*Id.*, ¶ 3.) Challengers cannot peremptorily disqualify that "arbitrator." (*See id.* at 89, ¶ 4.)

Moreover, "[c]onformity to legal rules of evidence [is] not . . . necessary." (*Id.* at 90, ¶ 14.) Challengers have no right to discovery, or to compel the testimony of union witnesses or production of union documents, but must ask the "arbitrator" to exercise his discretion to require the union to "produce such additional evidence as the arbitrator may deem necessary." (*See id.* at 88-94, *particularly* at 90, ¶ 14.). Before the hearing began, the pilots' counsel asked Aronin to permit discovery and require ALPA to identify its witnesses and exhibits in advance. Aronin denied discovery and advance identification. (*Id.* at 136.)

The "arbitration" hearing took three days, each a month apart. (Pet. App. at 71a.) The only witnesses were three ALPA employees. (R. 99, AAA Tr. at 3, 27, 179, 251, 481, 614.) Their testimony consisted of self-serving, general explanations of ALPA's activities, bookkeeping system, and preparation of the SGNE. (*See* R. 99, AAA Tr., *passim*.)[2] All documents ALPA introduced concerning its calculation of chargeable expenses

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[2] Only ALPA's Director of Finance testified about ALPA's calculation of chargeable expenses. He admitted that neither he nor anyone else canvassed individual employees, or even supervisors, to determine whether employees correctly charged time to the 1200 "project codes" used in identifying and calculating germane expenses. (R. 99, AAA Tr. at 377-79.) He also admitted he was "not in a position to give . . . breakdown details of the expenditures of any particular project code." (*Id.* at 517.)

were summaries or blank forms. (*See* Pet. App. at 118a-57a; R. 104, Ross Decl. at 7-11; R. 99, Exs. 8-9, 11-13A-E.) ALPA introduced no completed internal vouchers, requisition forms, expense statements, weekly time reports, or "New Project Request Forms."

Aronin issued his final decision on September 30, 1994. (Pet. App. at 71a-115a, 158a-61a.) He found that 158 pilots, including ninety-one Plaintiffs and Intervenors, were proper parties to the "arbitration." Thus, more than sixty Intervenor-Plaintiffs were ***not*** parties to the "arbitration." (*Id.* at 3a.) On the merits, Aronin ruled that ALPA's computation of germane 1992 expenses was "supported by the evidence and applicable Court decisions," with minor exceptions. He ordered ALPA to modify the agency fee by reallocating as nonchargeable a small number of expenses. (*Id.* at 114a-15a.) The recalculation reduced the chargeable percentage from 81% to 79.51%. (*Id.* at 161a.) Aronin upheld ALPA's treatment of its "input into" federal air-safety regulations as chargeable. (*Id.* at 108a.)

After ALPA filed the AAA decision with the district court, (J.A. at 4), the pilots served another request for production, asking for all documents identifying the nature of the activity and expenses in each "project code" ALPA used in allocating 1992 expenses as germane or nongermane, and the nature of expenses not included in those codes. ALPA refused to produce these documents, serving objections. (R. 89, Ex. 1.) The pilots moved to compel the requested production. (R. 89.)

On February 22, 1995, ALPA filed a second Motion for Summary Judgment, based on the "arbitration" record. (R. 98.) Besides opposing this motion on the merits, the pilots contended, with supporting declarations, that summary judgment could not be granted under Federal Rule of Civil Procedure 56(f), because ALPA refused discovery essential to their opposition. (R. 104.)

On April 18, 1995, the Magistrate granted in part the pilots' pending Motion to Compel Production. He required ALPA to



produce all documents identifying the nature of the activity and expenses included in twenty "project codes," and "New Project Request Forms" for fifty other codes, the pilots to select the codes from those ALPA treated as germane. (R. 109.) ALPA objected to this Order on April 27, 1995. (R. 114.) The court never ruled on these objections, and ALPA never produced the documents the Magistrate specified.

On April 28, 1995, the court granted ALPA summary judgment on all remaining claims, except the pilots' allegations that portions of the agency fees "were used for purposes not germane to collective bargaining." (Pet. App. at 44a-60a.) Additional briefing was ordered "on the issue of the impact of the arbitration on" those allegations. (*Id.* at 44a, 58a-60a.)

After further briefing, the court granted ALPA summary judgment "on the one remaining count." (*Id.* at 40a.) The court conceded that the pilots "never agreed by contract to be bound by a duty to arbitrate," and that "the RLA itself does not require the exhaustion of arbitration remedies." Nonetheless, it ruled that the pilots were required to exhaust ALPA's procedure "as a matter of judicial discretion," because it viewed exhaustion as necessary to "give effect to the procedures established by the Supreme Court in [*Teachers Local 1 v.*] *Hudson*," 475 U.S. 292 (1986). (*Id.* at 29a-32a.) The court also decided to defer to the arbitrator's findings on disputed factual issues, unless "clearly erroneous," and only "review *de novo* the arbitrator's legal conclusions." (*Id.* at 22a, 31a.) On the merits, the court accepted all of Aronin's factual findings and upheld all of his legal rulings. (*Id.* at 32a-39a.)

The United States Court of Appeals for the District of Columbia Circuit reversed in several respects. Most pertinent, the court of appeals held "that an employee who wishes to bring an action in federal court is not obliged to proceed first to arbitration, at the union's option," to challenge its calculation of lawfully chargeable expenses. The court concluded that there is "no *legal* basis for forcing into arbitration a party who never

agreed to put his dispute over federal law to such a process," and that there is nothing "in the *Hudson* majority opinion that even suggests that the Court thought it was putting protesting agency shop employees in that position." (*Id.* at 11a.)

The court of appeals also held, contrary to the "arbitrator," that ALPA may not lawfully charge the pilots for ALPA's "contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety." (*Id.* at 13a-15a.) The court also effectively reversed the district court's deference to the factual findings of the "arbitrator," because, even as to pilots who participated in ALPA's procedure, it reversed and remanded for discovery and "independent factual findings" on chargeability and accounting issues not decided by the court of appeals as a matter of law. (*Id.* at 15a, 17a-20a.) These "air safety" and deference issues were excluded from this Court's grant of certiorari. (*Compare* Pet. at i *with* Order Granting Cert.)

## SUMMARY OF ARGUMENT

**I.** In *Hudson*, this Court held that to collect agency fees a union must provide objecting nonmembers with a prompt opportunity to challenge the amount of the fee before an "impartial decisionmaker." That holding applies under the RLA, because the exaction of agency fees for nonbargaining purposes breaches the statutory duty of fair representation, and *Hudson* was grounded on both the First Amendment and basic considerations of fairness. *Hudson* also applies under the RLA because agency-shop agreements authorized by the RLA significantly impinge on First-Amendment rights.

*Hudson* did not expressly decide whether or not a nonmember must exhaust such a procedure before bringing a civil action challenging the agency fee if the "impartial decisionmaker" is privately appointed. Nothing in the *Hudson* majority opinion even hints that the Court intended that nonmembers could be forced to use a union-created nonjudicial procedure. The Court



did not even require unions to adopt arbitration to satisfy the requirement, but recognized that they could satisfy it by making expeditious judicial review possible. On the other hand, the Court did imply that exhaustion is not required by presuming that ordinary judicial remedies always remain available to objecting nonmembers. Moreover, an exhaustion requirement is inconsistent with the Court's concern that nonmembers obtain speedy resolution of their claims, since it delays judicial review of the union's calculation of the fee.

**II.** None of the ordinary circumstances under which exhaustion can be required exists here. The RLA does not mandate exhaustion, as ALPA concedes. The pilots have not agreed to submit their dispute with the union to its "arbitration" procedure, as ALPA also concedes, either explicitly, through a specific agreement, or implicitly, through the union-membership contract or the collective-bargaining agreement. And, ALPA's status as exclusive bargaining agent does not bind the pilots to its choice of forum, because ALPA is not an agent for nonmembers vis-à-vis itself.

Exhaustion cannot be required as a matter of judicial discretion unless exhaustion is consistent with congressional intent. Where Congress has indicated an intent that claims be judicially determined, a judicially imposed exhaustion requirement, based solely upon policy considerations, would violate Article III, section 1 of the Constitution.

ALPA and its *amici* identify no congressional intent that RLA agency-fee disputes should be submitted to any union-created remedy. However, Congress ***has*** indicated an intent that such cases be determined by the federal courts. Beginning with the seminal case of *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944), this Court has held repeatedly that the federal labor statutes "contemplate[] resort to the usual judicial remedies of injunction and award of damages" for breach of the duty of fair representation. Thus, as in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), with regard to similar constitu-

tional claims brought under 42 U.S.C. § 1983 (1988), the Court need not weigh policy considerations to determine that exhaustion cannot be required.

**III.** Even if it is assumed for the sake of argument that policy considerations can be weighed here, they are heavily weighted against exhaustion.

**A.** Exhaustion will not relieve the courts of having to determine agency-fee cases *de novo*, because *Hudson* held that an arbitrator's decision would not receive preclusive effect in any subsequent federal court action. Moreover, even if only limited judicial review were available where arbitration procedures are adequate and fair, that would merely require the courts to determine a different, but no less difficult, set of issues, *i.e.*, whether the particular proceeding was adequate and fair and whether the arbitrator's findings were clearly erroneous.

**B.** Unions are unlikely to face the "burden" of simultaneous arbitration and litigation, unless they fail to provide the prompt review that *Hudson* requires. Moreover, as the court of appeals recognized, unions can avoid arbitration completely simply by agreeing to class treatment of judicial claims and expediting discovery and other pre-trial proceedings. In any event, the costs of providing constitutional due process are not a permissible ground for failing to provide it.

**C.** Exhaustion is unlikely to resolve many cases for three reasons: (1) the many open questions as to how this Court's broad standards of chargeability should be applied; (2) the many difficult procedural questions that the courts will have to answer concerning the exhaustion requirement; and, (3) the understandable reluctance of nonmembers to accept the results of a so-called "arbitration" scheme in which they have no say in the selection of the decisionmaker and no right to discovery, despite the fact that all potential evidence is in their opponent's hands. The only sense in which exhaustion might



resolve some cases is that nonmembers' resources might be exhausted, but that result is contrary to federal policy.

**D.** Exhaustion is unlikely to simplify many cases, because a proceeding that lacks of rules of evidence, discovery as a matter of right, and compulsory process is not truly adversary. It, thus, neither reduces the need for discovery in a subsequent court action nor creates the type of record needed to decide these complex cases. Moreover, because labor arbitrators are unlikely to have the necessary expertise in deciding First-Amendment questions, their decisions under ALPA's scheme are unlikely to assist the courts.

**E.** An exhaustion requirement will unduly prejudice nonmembers, because: there is no definite time limit on proceedings under ALPA's procedure; the short filing deadline creates a high risk of forfeiture of claims; ALPA's scheme does not completely avoid the risk that challengers' monies will be spent unlawfully and deprives them of use of their monies for a substantial time; and, the "arbitrator" does not have authority to provide prospective injunctive relief.

**IV.** The "impartial decisionmaker" reviews the lawfulness of the union's final decision as to the amount of the fee that it takes from objecting nonmembers. Therefore, there is no merit to ALPA's and its *amici*'s argument that this is not an exhaustion case, but one in which the pilots' claim is not ripe until the "arbitrator" frees ALPA to spend money over their objection.

Moreover, ALPA's contention that the pilots must use its procedure is not only an exhaustion requirement. It is a requirement that would unlawfully invade the nonmembers' statutory and constitutional right not to associate with the union beyond payment of the costs of collective bargaining, because it would impose on them an additional aspect of union membership as a condition of their exercise of their right not to pay more.

## ARGUMENT

### I. This Court's *Hudson* Decision Does Not Require Nonmembers to Exhaust Union Agency-Fee "Arbitration" Schemes, But Merely Requires Unions Exercising Their Statutory Privilege of Collecting Coerced Fees to Make Available an Expeditious, Fair Alternative to Litigation.

ALPA's authority to require the pilots to pay an agency fee derives from RLA section 2, Eleventh, 45 U.S.C. § 152, Eleventh (1988). That section, however, is a "limited" exception to "the policy of full freedom of choice [of employees to join or not to join a union] embodied in" sections 2, Fourth and Fifth of the original RLA, 45 U.S.C. §§ 152, Fourth and Fifth (1988). *Machinists v. Street*, 367 U.S. 740, 750, 767 (1961).

*Street* and *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), construed section 2, Eleventh as limiting a union to charging objecting nonmembers for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." That narrow construction was adopted "to avoid serious doubt" of the section's constitutionality under the First Amendment. *Street*, 367 U.S. at 749-50; *accord Ellis*, 466 U.S. at 444-45. As *Ellis* held, the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." 466 U.S. at 455 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

*Hudson* prescribed procedural safeguards that are "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. *Hudson* was a public-sector case. However, *Hudson* applies under the RLA for two reasons.

First, *Communications Workers v. Beck* held that "the exaction of fees beyond those necessary to finance collective-bargaining activities violates . . . the judicially created duty of fair representation." 487 U.S. 735, 742-44, 762-63 (1988).



Insofar as agency shops are concerned, that duty is identical under the RLA and section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a) (1988). *See Beck*, 487 U.S. at 745-47, 752; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). Contrary to the suggestion of *amicus* American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), (AFL-CIO's Br. at 3), *Hudson* grounded its entire analysis on "***[b]asic considerations of fairness***, as well as concern for the First Amendment rights at stake." 475 U.S. at 306 (emphasis added); *see id.* at 302-04 & nn.11-13. Thus, as the court of appeals held, there is "no reason why th[e] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does [the] constitutional duty" under *Hudson*. (Pet. App. at 10a.)

Second, as the court of appeals also explained, "the *Hudson* requirements . . . obtain vis-a-vis unions who negotiate agency shop agreements with private employers covered by the RLA," because this Court held in *Railway Employes' Department v. Hanson*, 351 U.S. 225, 232 (1956), that "agency shop agreements under the RLA carr[y] the imprimatur of federal law." (Pet. App. at 8a.) In short, *Hudson* applies under the RLA, because the agency shop authorized by the RLA is itself "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; *accord Hudson*, 475 U.S. at 307 n.20.[3]

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[3] ALPA and the AFL-CIO argue that the Court "should no longer follow" *Hanson* on the issue of governmental action, because the RLA "in no way coerces or encourages parties to enter into agency-shop agreements." (ALPA's Br. at 16 n.7; *see* AFL-CIO's Br. at 12 n.4.) The Court should decline to consider this issue because it was not presented below, (*see* Pet. App. at 8a), or in ALPA's Petition for Certiorari, (*see* Pet. at 10 n.4). *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). The Court also should refrain from considering this issue because it is not necessary to decide the case, just as the Court declined to decide it for that reason in *Beck*, 487 U.S. at 761-62. ALPA concedes that there is "'no reason why

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One *Hudson* requirement is "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 310. ALPA attempted to meet this requirement by adopting an "arbitration" scheme. Its procedure does not itself require exhaustion; it merely provides that a nonmember "may" utilize it. (J.A. at 69.) Moreover, ALPA concedes that the opinion of the Court "in *Hudson* did not discuss the question of whether a fee payer must exhaust the impartial-decisionmaker procedure before challenging an agency-fee calculation in court," because "[t]hat issue was not raised on the facts presented." (ALPA's Br. at 16.)

Nonetheless, ALPA argues that exhaustion of its procedure should be required solely "on the basis of judicial discretion," because *Hudson* "required [it] to provide that procedure whether it wishes to do so or not." (*Id.* at 19.) ALPA contends that "one of the apparent purposes of *Hudson* is to establish an alternative dispute resolution procedure to relieve the courts of having to

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[3] (...continued)
[the] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty.'" (ALPA's Br. at 15-16 (quoting Pet. App. at 10a).)

Moreover, ALPA and the AFL-CIO are wrong. In the RLA cases and *Abood*, the Court found that legislative authorization and potential judicial enforcement of union decisions to use coerced fees for nonbargaining purposes would (*Hanson*, *Street*, and *Ellis*) and did (*Abood*) constitute "coercive power or . . . such significant encouragement . . . that the choice must in law be deemed to be that of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). *See Ellis*, 466 U.S. at 455-56; *Abood*, 431 U.S. at 232-33; *Street*, 367 U.S. at 746-50; *Hanson*, 351 U.S. at 232 & n.4. And, Congress' choice (or omission) of procedures to protect against prohibited expenditures also requires constitutional scrutiny: "While private misuse of a . . . statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). *See Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198-99 (1944).



'micromanage' agency-fee calculations." (*Id.* at 21.) *Amicus* National Education Association ("NEA") similarly argues that "*Hudson*, fairly read, contemplates that all objectors will proceed through the impartial decisionmaking process established by the union." (NEA Br. at 11.)

However, as the court of appeals recognized, nothing "in the *Hudson* majority opinion . . . even suggests that the Court thought it was putting protesting agency shop employees in th[e] position" of being forced to use a union-created nonjudicial procedure for reasons of judicial economy, or for any other reason. (Pet. App. at 11a.)[4] *Hudson* gave ***only one*** reason for

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[4] All but one of the United States Courts of Appeals and state supreme courts that have considered this issue agree with the D.C. Circuit that *Hudson* does not require exhaustion of agency-fee arbitration procedures. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816 (9th Cir. 1997); *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 694 (6th Cir. 1996) (dictum), *cert. denied*, 117 S. Ct. 682 (1997); *Abrams v. Communications Workers*, 59 F.3d 1373, 1382 (D.C. Cir. 1995); *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367-68 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988); *see also Brosterhous v. State Bar*, 906 P.2d 1242, 1251, 1255-58 (Cal. 1995) (no exhaustion required of attorneys challenging the amount of compulsory Bar dues); *but see Lancaster v. ALPA*, 76 F.3d 1509, 1521-22 (10th Cir. 1996). These are not "all public-sector cases brought under 42 U.S.C. § 1983" (1988), as ALPA's Brief at 18 n.9, asserts. *Abrams* and *Mulder* were both brought under the NLRA, 29 U.S.C. §§ 151-69 (1988).

Neither did *Hohe* hold that exhaustion "may be required as to accounting disputes concerning the amount spent for any activity," (ALPA's Br. at 18 n.9). *Hohe* held that a statutory exhaustion requirement was "invalid in its entirety," and that the district court erred in leaving to arbitration in the first instance the nonmembers' accounting "challenges to

(continued...)

holding that "the constitutional requirements for the Union's collection of agency fees include . . . a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310. That reason was that the "nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.* at 307.

That *Hudson* also requires a union to escrow objecting nonmembers' disputed fees "while such challenges are pending," *id.* at 310, does not imply that exhaustion of a union's arbitration procedure is necessary, as the NEA argues, (NEA's Br. at 11-12). The principle that a "forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response to the nonunion employees' objections," *Hudson*, 475 U.S. at 305-06, applies regardless of the forum.[5]

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[4] (...continued)
the amount of the chargeable fee." 956 F.2d at 408-09, 416, *rev'g in pertinent part* 135 L.R.R.M. (BNA) 3026, 3028 (M.D. Pa. 1990). Nor did *Hudson v. Teachers Local 1*, 922 F.2d 1306 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("*Hudson II*"), "squarely" hold that exhaustion is required, as ALPA and the AFL-CIO contend, (ALPA's Br. at 17-18; *accord* AFL-CIO's Br. at 11 n.3). As the Sixth Circuit has recognized, the "exhaustion issue was not before the [*Hudson II*] panel at all," only the adequacy of the union's notice; *Hudson II* was merely responding to an argument "that the correctness of the amount had to be adjudicated in court *before the fee could be collected and escrowed in the first instance.*" *Bromley*, 82 F.3d at 694; *see Hudson II*, 922 F.2d at 1313-14.

[5] The Court's application of this principle in *Hudson* and *Ellis*, 466 U.S. at 443-44, implicitly overruled the earlier holding of *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963), that "dissenting employees . . . can be entitled to no relief until final judgment in their favor is entered."



Nothing prevents a union sued for allegedly overcharging agency fees from asking the court to require escrow of only that part of the fees that "a certified public accountant's verified breakdown of expenditures" shows represents "categories that no dissenter could reasonably challenge." *See id.* at 310. Nothing also prevents a union from expediting judicial proceedings "by making pre-trial concessions regarding discovery and other time-sensitive matters," (Pet. App. at 12a), and refraining from such delaying tactics as pre-trial motions and resisting discovery.

Indeed, as the court of appeals noted, "*Hudson* . . . did not require arbitration *per se*" to satisfy the impartial-decisionmaker requirement. (*Id.*) *Hudson* merely said that "an expeditious arbitration ***might*** satisfy the requirement." 475 U.S. at 308 n.21 (emphasis added). *Hudson* also recognized that a court can be the impartial decisionmaker: "[c]learly, . . . if a State chooses to provide extraordinarily swift judicial review for these challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." *Id.* at 308 n.20. Thus, ALPA could avoid having both to provide arbitration and defend litigation simply by providing for expedited federal court review, instead of "arbitration," in its procedure.[6]

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[6] *Hudson* does not imply an exhaustion requirement because Justice White's concurring opinion, in dicta, said that a union providing for arbitration "should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U.S. at 311 (White, J., concurring). The *Hudson* majority evidently deliberately chose not to adopt that position. However, it specified that, if a nonmember uses arbitration, the "arbitrator's decision would not receive preclusive effect in any subsequent [civil] action," *id.* at 308 n.21. The juxtaposition of the majority's failure to state agreement with Justice White and its clarification that arbitration would not be preclusive suggests that the majority assumed that nonmembers are not required to exhaust arbitration remedies. *See Brosterhous v. State Bar*, 906 P.2d 1242, 1251 (Cal. 1995); (Pet. App. at 11a & n.1).

On the other hand, while nothing in *Hudson* suggests an exhaustion requirement, *Hudson* does indicate that nonmembers need not use arbitration if a union makes it available to satisfy the impartial-decisionmaker prerequisite to collecting agency fees. *Hudson* requires the union to provide an "***opportunity*** to challenge the amount of the fee before an impartial decisionmaker."*Id.* at 310 (emphasis added). Self-evidently, one is not compelled to use an "opportunity." ALPA's argument "confuses the union's presumed responsibility to provide a means of dispute resolution with its ability to *force* non-union members to use its selected method." *Food & Commercial Workers Local 951 v. Mulder*, 31 F.3d 365, 367 (6th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

ALPA is correct that *Hudson* allows a union "to provide an ***alternative***, nonjudicial mechanism for dealing with . . . agency-fee disputes." (ALPA's Br. at 15 (emphasis added).) However, an "alternative" "offer[s] or express[es] a choice." *Webster's New Collegiate Dictionary* 34 (1977). A ***choice*** presumes that a ***second*** option exists, *i.e.*, bypassing arbitration for litigation. *See Hohe v. Casey*, 956 F.2d 399, 409 (3d Cir. 1992).

*Hudson* itself clearly suggests that ***nonmembers*** still have a right to a judicial forum if a union provides a nonjudicial review procedure for objections. *Hudson* held that First-Amendment due process mandates that the "union have a responsibility to provide procedures . . . that facilitate a nonunion employee's ability to protect his rights," ***despite "the availability of ordinary judicial remedies***." The Court "presume[d] that ***the courts remain available*** as the ultimate protectors of constitutional rights." *Id.* at 307 n.20 (emphasis added).

Moreover, as the Ninth Circuit concluded in *Knight v. Kenai Peninsula Borough School District*, the Court in *Hudson*

> seemed most concerned with ensuring that nonmembers be able to obtain a speedy resolution without having to endure lengthy and protracted litigation in



> court. To require nonmembers to exhaust arbitration ***before*** being entitled to file a federal court action would frustrate the intent of expediting the chargeability calculation and refund process.

131 F.3d 807, 816 (9th Cir. 1997) (emphasis added).

In sum, *Hudson* provides no basis for requiring exhaustion here and persuasively suggests that exhaustion is not required.

## II. Exhaustion Cannot Be Required Here, Because There Is No Agreement to Arbitrate, and Mandatory Exhaustion Would Be Inconsistent with Congress' Intent That Unfair Representation and Constitutional Claims Are Uniquely Within the Federal Courts' Jurisdiction.

Recognizing that "the majority opinion in *Hudson* did not discuss" the exhaustion issue, because it "was not raised on the facts presented," ALPA relies primarily on general exhaustion principles. (*See* ALPA's Br. at 16, 19-25.) However, neither ALPA nor either of its *amici* cites a single case in which this Court has required exhaustion of a nonconsensual, nonstatutory, nonjudicial procedure created by a private party to determine statutory and constitutional rights of an adversary. And, none of the ordinary circumstances under which exhaustion can be required exists here.

Where "Congress specifically mandates, exhaustion is required." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). However, ALPA and its *amici* do not contend that the RLA specifically mandates exhaustion of union-created procedures for agency-shop disputes. It does not. *See* 45 U.S.C. §§ 151-88 (1988).

Absent a statutory mandate, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *accord, e.g.*, *First Options of Chicago,*

*Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). The agreement can be individual, *e.g.*, in a securities registration application, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), or in the union-member contract, *see Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965).[7] It also can be part of a collective-bargaining agreement, negotiated by a union as the employees' agent, to arbitrate employee-employer disputes under that agreement. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965).

However, ALPA does not claim that there is ***any*** agreement to arbitrate here. There is none. Nor does ALPA claim that its agency-fee "arbitration" is part of the collective-bargaining agreement with Delta. ALPA alone has instituted and now attempts to enforce its "arbitration scheme," with no input, approval or acquiescence from the pilots. Quite the contrary: Some of the pilots participated in ALPA's "arbitration" only under protest, after the district court denied an injunction to stop it. Others refused to participate at all. (Pet. App. at 2a-3a.)

Moreover, the pilots are nonmembers of ALPA. (*Id.* at 2a.) As such, they are "not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum." *Soto Segarra v. Sea-Land Serv., Inc.*, 581 F.2d 291, 295 (1st Cir. 1978); *see Bagnall v. ALPA*, 626 F.2d 336, 341 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981). Also, neither ALPA's status as the pilots' exclusive bargaining agent, nor a collective-bargaining agreement, could require the pilots, as nonmembers, to arbitrate their statutory and constitutional disputes with ***itself***, as opposed to disputes with their employer. "ALPA is the agent for the nonmembers only vis-à-vis the

[7] However, requirements that union members exhaust internal union remedies are limited both by statute and this Court's decisions. *See* 29 U.S.C. § 411(a)(4) (1988); *Clayton v. Auto Workers*, 451 U.S. 679 (1981).



employer, it is not an agent for the nonmembers vis-à-vis itself." (Pet. App. at 163a (Silberman, J., concurring in denial of reh'g)); *see Mulder*, 31 F.3d at 368-69; *Bagnall*, 626 F.2d at 341-42; *see also NLRB v. Maddox*, 415 U.S. 322, 324-26 (1974) (a union could not contractually waive employees' individual statutory rights where it had an adverse self-interest).

ALPA argues that, although there is neither a statutory mandate nor an agreement for arbitration, "whether administrative remedies must be exhausted is a matter committed to 'sound judicial discretion.'" (ALPA's Br. at 19 (quoting *McCarthy*, 503 U.S. at 144).) ALPA also contends that there are "two separate and independent reasons that can support a requirement of exhaustion—one being 'protecting administrative agency authority' and the other being 'promoting judicial efficiency.'" (*Id.* at 20 (quoting *McCarthy*, 503 U.S. at 145).) The first of these considerations clearly does not apply here, since neither ALPA nor the AAA is an administrative agency. ALPA argues that exhaustion should be required ***solely*** because of policy considerations of judicial efficiency. (*See id.* at 20-25.)

ALPA ignores the primary principle of the exhaustion doctrine. "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *McCarthy*, 503 U.S. at 144 (quoting *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982)). Even "in th[e] field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.*

Therefore, contrary to ALPA's assumption, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy*, 457 U.S. at 513; *see id.* at 501-02 & n.4 (followed in *McCarthy*, 503 U.S. at 144). In particular, "the perceived burden that . . . actions impose on federal courts" "alone is not sufficient to justify a judicial decision to alter congressionally imposed

jurisdiction." *Id.* at 512 & n.13; *cf. La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 259 (1957) (neither a crowded calendar nor the presence of complex issues warrants appointment of a special master in a federal action over a party's objections); *In re Bituminous Coal Operators' Ass'n*, 949 F.2d 1165, 1168-69 (D.C. Cir. 1991) (R. Ginsburg, J.) (same).

Policy considerations alone are insufficient for the federal courts to impose exhaustion, because those courts "are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy*, 503 U.S. at 146 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18 (1976)). The source of that obligation is Article III, section 1 of the Constitution, which "preserves to litigants their interest in an impartial and independent ***federal adjudication*** of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added); *see Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (Kennedy, J., en banc), *cert. denied*, 469 U.S. 824 (1984).

There are only four exceptions to Article III's rule that Article III judges must decide federal cases. None applies here. The first two, "military tribunals" and "territorial courts," are clearly inapplicable. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585 (1985). The third is when parties ***waive*** their right to a judicial determination. *See Schor*, 478 U.S. at 848-49. That condition is not met here, because the pilots did not consent to determination of their statutory and constitutional claims by ALPA's "arbitrator." *See supra* pp. 20-21.

The fourth exception to the rule of Article III adjudication is where a "statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity" or where

> "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, ***then it must be adjudicated by an Article III court***.



*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-55 (1989) (quoting *Thomas*, 473 U.S. at 593-94) (alteration in original) (emphasis added) (citation omitted). That returns the issue here to the controlling question of congressional intent.

The statutes mandating federal subject-matter jurisdiction upon which the pilots rely—28 U.S.C. §§ 1331 and 1337(a) (1988)—contain no explicit, or judicially divined, expression of congressional intent that arbitration procedures be exhausted in any case. Also, ALPA and its *amici* identify no congressional intent that agency-fee disputes under the RLA should be submitted to arbitration, much less union-created *ersatz* "arbitration." The closest they come is that ALPA mentions that "'Congress has expressly approved contract grievance procedures as a preferred method for settling disputes.'" (ALPA's Br. at 20 (quoting *Republic Steel*, 379 U.S. at 653).)

However, the congressional preference to which ALPA adverts is for "adjustment by a method ***agreed*** upon by the parties . . . for settlement of grievance ***disputes arising over the application or interpretation of an existing collective-bargaining agreement***," *i.e.*, disputes between employees and/or unions on the one hand and employers on the other. 29 U.S.C. § 173(d) (1988) (emphasis added); *see Republic Steel*, 379 U.S. at 652-53. Here, the pilots have not agreed to use ALPA's procedure, and this is not a dispute over a collective-bargaining contract.

Congress has done more than refrain from expressly approving union "arbitration" procedures as the preferred

method for settling agency-fee disputes. In the RLA, as interpreted by this Court, Congress also has indicated an intent that such cases be determined by the federal courts.

A claim that a union unlawfully exacts agency fees under the RLA for purposes other than collective bargaining raises issues under both the statute and the First Amendment. *See Ellis*, 466 U.S. at 445-48, 455-56. It also is a claim of breach of the union's statutory duty of fair representation. *Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988). In *Steele v. Louisville & Nashville R.R.*, to avoid constitutional questions, this Court found that the RLA imposes that duty on an exclusive bargaining representative. 323 U.S. 192, 198-203 (1944).

*Steele* also held that an unfair representation claim "is not one . . . determinable under the administrative scheme set up by the Act or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration." *Id.* at 204-06 (citations omitted); *see Beck*, 487 U.S. at 743. Rather, the Court concluded,

> the right here asserted, to a remedy for a breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. . . .
>
> . . . . ***[T]he statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty***.

*Id.* at 207 (emphasis added); *see Beck*, 487 U.S. at 743 ("the RLA . . . leaves it to the courts to determine the validity of [union] activities challenged under the Act"). Congress, which obviously is aware of *Steele*'s construction of the RLA in 1944,



has not seen fit to amend the Act to limit or qualify the courts' jurisdiction over unfair representation cases.

Furthermore, like 42 U.S.C. § 1983 (1988), the purpose of the duty of fair representation is to interpose the federal courts as the "paramount" guardians of individual rights. *Compare Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-75 (1989) *and Vaca v. Sipes*, 386 U.S. 171, 181-82 (1967) *with McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) *and Patsy*, 457 U.S. at 503-04. Indeed, because the "right of the individual employee to be made whole is '[o]f paramount importance,'" that "a breach of the duty of fair representation might also be an unfair labor practice [normally within the exclusive jurisdiction of the National Labor Relations Board ("NLRB")] is . . . not enough to deprive a federal court of jurisdiction over the fair representation claim." *Breininger*, 493 U.S. at 75 (quoting *Bowen v. United States Postal Serv.*, 459 U.S. 212, 222 (1983)); *see Beck*, 487 U.S. at 743.[8]

Thus, this case is similar to *Patsy*, in which the Court reaffirmed "categorically that exhaustion is not a prerequisite to an action under § 1983," policy considerations notwithstanding. 457 U.S. at 500-01, 512-16; *see Felder v. Casey*, 487 U.S. 131, 146-50 (1988). Public-sector agency-shop cases are brought under section 1983. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 513 (1991); *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 688, 692 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997). *Patsy* and *Felder* are controlling on the exhaustion issue in those cases. *See Knight v. Kenai Peninsula Borough Sch.*

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[8] Like the vast majority of the courts, *see supra* note 4, the Board has rejected as "meritless" a union's argument that it should await exhaustion of "the arbitration procedure set forth in [the union's] dues-objection policy" before proceeding on claims that the union has extracted agency fees for purposes other than collective bargaining and contract administration. *California Saw & Knife Works*, 320 N.L.R.B. 224, 224 n.1, 276-77 (1995), *enforced*, 157 L.R.R.M. (BNA) 2287 (7th Cir. Jan. 14, 1998).

*Dist.*, 131 F.3d 807, 816 (9th Cir. 1997); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992); *Tierney v. City of Toledo*, 917 F.2d 927, 939-40 (6th Cir. 1990); *Brosterhous v. State Bar*, 906 P.2d 1242, 1255-58 (Cal. 1995); *Gibney v. Toledo Bd. of Educ.*, 532 N.E.2d 1300, 1303-05 (Ohio 1988).

This Court has treated the rights of private- and public-sector employees forced to pay agency fees as essentially coextensive. *See, e.g., Lehnert*, 500 U.S. at 516, 523 (opinion of the Court), 555 (Scalia, J., concurring); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 229-32 (1977). Thus, to hold that exhaustion can be required here, the Court would either have to treat private- and public-sector employees in radically different ways for the first time, or overrule *Patsy* and *Felder*.

ALPA and the NEA argue that an exhaustion requirement in agency-fee cases is not inconsistent with *Patsy*, because *Patsy* concerned state remedies, but, they say, the "impartial-decision-maker procedure required by *Hudson* . . . is a federal remedy." (ALPA's Br. at 18 n.9; *accord* NEA's Br. at 17.) However, the principles of the exhaustion doctrine *Patsy* applied are the same for state and federal remedies. *Compare McCarthy*, 503 U.S. at 144 *with Patsy*, 457 U.S. at 501-02 & n.4.

Moreover, ALPA's "arbitration" is not a federal administrative remedy. It is a union-created and -controlled private remedy, voluntarily adopted by ALPA to satisfy a constitutional and statutory prerequisite to its collection of agency fees. Clearly, if federal courts need and ought not defer to a federal agency in agency-fee cases arising under the duty of fair representation, as *Beck* held, 487 U.S. at 743-44, with even greater reason they need and ought not defer to a private "arbitration" set up by the very union the employees claim violated that duty.

In sum, as in *Patsy*, exhaustion cannot be required here, and there is no occasion to determine the weight of the policy considerations urged by ALPA and its *amici*, because exhaustion



is inconsistent with Congress' intent that the federal courts have a paramount role in the determination of constitutional and duty-of-fair-representation claims.

## III. Even If It Is Assumed *Arguendo* That Policy Considerations Are Relevant, They Suggest That Exhaustion Should Not Be Required in Agency-Fee Cases.

Where congressional intent does not militate against an exhaustion requirement, as it does here, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy*, 503 U.S. at 146. Although *Patsy* held that exhaustion could not be required under section 1983 as a matter of judicial discretion, due to its inconsistency with congressional intent, the Court also concluded that "policy considerations" could not justify judicially imposed exhaustion there because they did "not invariably point in one direction." 457 U.S. at 512-13. Assuming for the sake of argument that policy considerations can be weighed at all here, they are at least equally inconclusive, if not heavily weighted ***against*** exhaustion.

### A. Exhaustion Will Not Relieve the Courts of Having to "Micromanage" Agency-Fee Cases.

The first policy consideration ALPA advances is that exhaustion purportedly would "relieve the courts of having to 'micromanage' agency-fee calculations." (ALPA's Br. at 21.) Yet, ALPA admits that "this Court has already made clear that the arbitration would not be 'preclusive.'" (*Id.* at 24 (quoting *Hudson*, 475 U.S. at 308 n.21).) Thus, ALPA apparently means that judicial review of agency-fee calculations will be limited to the "arbitration" record on a "clearly erroneous" basis unless "in a particular case the challengers could show that the arbitration procedures were somehow inadequate or unfair." (*See id.* at 22 n.10, 24.)

That suggestion presumes the answer to a question that "was excluded from this Court's grant of certiorari," (*id.* at 9 n.6), *i.e.*, whether judicial review is limited, as the district court held, (Pet. App. at 22a), or *de novo*, as the court of appeals recognized, (*id.* at 15a, 17a-20a). ALPA's suggestion also is erroneous, because, in ruling that an "arbitrator's decision would not receive preclusive effect in any subsequent . . . action" in federal court challenging an agency fee, *Hudson* cited *McDonald v. City of West Branch*, 466 U.S. 284 (1984). 475 U.S. at 308 n.21.

*McDonald* held that, "in a § 1983 action, a federal court should not afford . . . collateral-estoppel effect to an award in an arbitration proceeding." 466 U.S. at 292. *McDonald* also described "a rule that would have required federal courts to ***defer*** to an arbitrator's decision" as one that would "***preclude*** a subsequent suit in federal court." *Id.* at 288-89 (emphasis added). Thus, per *McDonald*, *Hudson*'s ban on deference to arbitration embraces both legal and factual issues. *See McDonald*, 466 U.S. at 287 n.5 (collateral estoppel applies to issues of fact), 292 & n.13 ("an arbitration proceeding cannot provide an adequate substitute for a judicial ***trial***"; it "'is the duty of courts to assure the ***full*** availability of th[e judicial] forum'") (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974)) (emphasis added); *see also Clayton v. Auto Workers*, 451 U.S. 679, 693 (1981) ("exhaustion [of union remedies] would not lead to significant savings in judicial resources, because regardless of the outcome of the internal appeal, the employee would still be required to prove *de novo* in his . . . suit that the union breached its duty of fair representation").

Furthermore, even if ALPA were correct that only limited judicial review is available where agency-fee arbitration procedures are adequate and fair, that would merely mean that the federal courts would have to "micromanage" a different, but no less difficult, set of issues in these cases, *i.e.*, the adequacy and fairness of the particular "arbitration" proceeding and whether the decisionmaker's factual findings were clearly erroneous.



### B. The Purported Burden of Simultaneous Arbitration and Litigation Is Improbable and Irrelevant.

ALPA next complains that, unless exhaustion is required, "a union could be confronted by *simultaneous* agency-fee challenges, in court and before a *Hudson* impartial decisionmaker." (ALPA's Br. at 21.) The NEA adds that simultaneous litigation and arbitration "would be the most expensive and burdensome system imaginable." (NEA's Br. at 13-14.) However, unless a union fails to provide the "expeditious arbitration" and "reasonably prompt decision" *Hudson* requires, 475 U.S. at 307, 308 n.21, arbitration is likely to be concluded before the merits are at issue in a court action.

Moreover, if, instead of opposing class certification and discovery, as ALPA did here, *see supra* note 1 & pp. 3, 6-7, a union agreed to class treatment of judicial claims and willingly provided discovery, arbitration would be unnecessary, as the court of appeals pointed out. (Pet. App. at 12a-13a.) It is highly unlikely that any objecting nonmembers would opt out of a class action and insist on submitting their claims *pro se* or through personal counsel to a privately appointed decisionmaker if notified that their claims would be determined by the federal courts in an action in which the class representatives would provide counsel.

This action was filed more than a year and a half before ALPA's internal proceedings began. (*Compare* J.A. at 1 *with id.* at 71-78.) ALPA ***chose*** to conduct the latter over the pilots' objections. (*See id.* at 103-04.) ALPA contends that it had to proceed, because "fee payers who were not litigants in this case requested arbitration." (ALPA's Br. at 21.) However, it is implausible that any of those fee payers would have insisted on pursuing ALPA's procedure had they been notified that the federal courts would decide their challenges.

In any event, the union's costs and administrative burdens in meeting the "impartial decisionmaker" requirement are

irrelevant. The "procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Andrews v. Cheshire Educ. Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); *accord Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990); *see Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (quoting with approval *Keller v. State Bar*, 767 P.2d 1020, 1046 (Cal. 1989) (Kaufman, J., dissenting), *rev'd*, 496 U.S. 1 (1990)); *Ellis*, 466 U.S. at 444.

Furthermore, the unions' complaints about the burdens and costs of satisfying *Hudson* are hypocritical. They can reduce those burdens by not engaging in dilatory litigation tactics and providing for expedited judicial proceedings, instead of "arbitration," in their procedures. *See supra* p.17. Moreover, a union has those burdens only because "it ***voluntarily*** seeks to collect service fees from the non-union members." *See Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987) (emphasis added).

### C. Exhaustion Is Unlikely to Resolve Many Cases.

The third policy consideration that ALPA and its *amici* propose is that, "on some occasions, all parties will accept the decision of the arbitrator, thus obviating the need for court litigation." (ALPA's Br. at 22; *see* AFL-CIO's Br. at 15-16; NEA's Br. at 14, 17.) This is improbable for three reasons.

First, as ALPA notes, this Court's "broad standards [as to what is chargeable or not] have proven to be distressingly difficult to apply." (ALPA's Br. at 13); *see, e.g., Bromley*, 82 F.3d at 691; *Beckett v. ALPA*, 59 F.3d 1276, 1280-81 (D.C. Cir. 1995) (Silberman, J., concurring). Thus, until this Court settles more clearly what activities are lawfully chargeable, nonmembers are likely to continue to seek resolution of chargeability issues by the federal courts.



Second, as in *Patsy*, "it is by no means clear that judicial discretion to impose an exhaustion requirement . . . would lessen the caseload of the federal courts, at least in the short run," for another reason. 457 U.S. at 513 n.13. That is, the courts still would have to answer "difficult questions concerning the design and scope of [the] exhaustion requirement," including

> the standards for judging the kinds of [arbitration] procedures that should be exhausted; what tolling requirements and time limitations should be adopted; what is the res judicata and collateral estoppel effect of particular [arbitration] determinations; [and] what consequences should attach to the failure to comply with procedural requirements. . . . These and similar questions . . . would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary.

*Id.* at 513-14 (footnotes omitted).

Third, as the court of appeals recognized, nonmembers are unlikely to accept the decisions of "arbitrators" under the particular scheme at issue here, because they understandably question the fairness of a procedure in which they have no say in the selection of the decisionmaker and no right to discovery, even though all potential evidence is solely in the union's hands. (*See* Pet. App. at 11a-12a); *see also* Thomas R. Haggard, *Union Security in the Context of Labor Arbitration*, 1994 Nat'l Acad. Arb. Proc. 110, 123 (same). This scheme, which is used by most unions, (NEA's Br. at 12 n.10.), is not true arbitration.[9]

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[9] The NEA asserts that the question of whether use of an AAA "arbitrator" satisfies *Hudson* "was not raised below and is not encompassed in the grant of certiorari." (NEA's Br. at 13 n.10.) The question is not whether the AAA scheme satisfies *Hudson*, but whether this is the type of procedure that permits judicial deference to it. *See McCarthy*, 503 U.S. at

(continued...)

***Mutual*** "selection of the arbitrators by the parties to the dispute" is "a fundamental characteristic of arbitration." *Associated Plumbing & Mech. Contractors v. Plumbers Local 447*, 811 F.2d 480, 483-84 (9th Cir. 1987); *see* Frank Elkouri & Edna A. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985); Owen Fairweather, *Practice and Procedure in Labor Arbitration* 79-90 (2d ed. 1983) (cited in *Hudson*, 475 U.S. at 308 n.21). Indeed, a scholar cited by ALPA and the NEA, (ALPA's Br. at 19 n.9; NEA's Br. at 19), in an article they do not cite, includes "***mutual*** selection of the arbitrator" as one of the "***minimum*** standards of arbitral procedural justice." Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 St. Louis U. L.J. 77, 96-99 (1996) (emphasis added).[10]

ALPA contends that "there is no basis" for attacking the impartiality of the AAA, because such attacks have "been uniformly rejected." (ALPA's Br. at 23 & n.11.) The cases ALPA cites, though, merely held that the AAA's procedure satisfies *Hudson*'s requirement for an "impartial decisionmaker"

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[9] (...continued)
146-49. This question was raised below. (*See* Appellants' Br. at 18-19, 21-23.) It also is "fairly included" within the question presented, Sup. Ct. R. 14.1(a), because, before the Court can require exhaustion as a matter of judicial discretion, it must address the adequacy of the procedure. *See McCarthy*, 503 U.S. at 146-49. In any event, a respondent here is "entitled . . . to urge any grounds which would lend support to the judgment below." *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

[10] Malin says that mutual selection is "impractical" in agency-fee disputes, because they "often involve numerous objecting fee-payers." Malin, *supra*, at 99. However, he also suggests that "candidates for inclusion on employment arbitration rosters" should be required to have equal numbers of "references from employer and employee advocates." *Id.* at n.104. Similarly, arbitrators could easily be mutually selected by the union and an advocate of the interests of nonmembers, *e.g.*, the National Right to Work Legal Defense Foundation.



in the abstract. They did not consider whether that scheme is adequate to support ***forced*** arbitration. One ground Malin gives to justify the lack of mutual selection under the AAA's procedure is that "the union security fee objector is not obligated to use the arbitration procedure, but may bypass it and sue the union in federal court." Malin, *supra*, at 99.

Contrary to ALPA's speculation, nonmembers are ***more*** likely to accept the decisions of arbitrators, thus making court litigation unnecessary, if both options are available in the first instance, because then unions are more likely to adopt arbitration procedures that will satisfy nonmembers. At the least, as the Court said in *Patsy*, "it is uncertain whether the present 'free market' system, under which litigants are free to pursue administrative remedies if they truly appear to be cheaper, more efficient, and more effective, is more likely to induce the creation of adequate remedies than a . . . standard under which plaintiffs have no initial choice." 457 U.S. at 513 n.15.

The only sense in which an exhaustion requirement here might lead to reduced litigation is that "exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his [statutory] claim in court, but that result is surely inconsistent with federal policy." *Clayton v. Auto Workers*, 451 U.S. 679, 693 n.22 (1981).[11]

### D. Exhaustion Is Unlikely to Simplify Many Cases.

ALPA and its *amici* also argue that the "record of the arbitration proceeding, and the arbitrator's decision, should help to define the issues before the court and streamline both pretrial

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[11] Contrary to the implication of ALPA's Brief at 14, the National Right to Work Legal Defense Foundation does not have the resources to support a lawsuit for every nonmember who wants to challenge his agency fees. In this case, the Foundation provided the pilots with an attorney only after they had filed their Notice of Appeal. (*See* R. 138; R. 140.)

and trial procedures." (ALPA's Br. at 22; *see* AFL-CIO's Br. at 16-18; NEA's Br. at 14, 17.) This really means that the unions want to use "arbitration" to avoid disclosing the relevant facts to their litigation opponents and having to meet their burden of proof, under rules of evidence, in a truly adversary hearing before an Article III judge qualified to determine what speech and association they can lawfully compel.

ALPA discloses the unions' true agenda by contending that, "because the union has the burden of proof and must affirmatively present evidence explaining and justifying its agency-fee calculation, objectors would normally have little need for prehearing discovery." (ALPA's Br. at 24.) The NEA adds that, because "objectors have already received a notice informing them of the union's expenditures, there is no reason why [AAA] Rule 14 should not enable objectors to obtain sufficient 'discovery.'" (NEA's Br. at 15 n.11 (citation omitted).) Rule 14, of course, is the rule under which discovery is available to nonmembers only at the discretion of the AAA-appointed "arbitrator"—and under which the "arbitrator" in this case denied the pilots any discovery. (J.A. at 90, ¶ 14; J.A. at 136.)

The AFL-CIO further reveals the unions' agenda here by asserting that in a subsequent court action "the objecting fee payer can reasonably be required to identify in what respects the union's evidence accepted by the arbitrator is insufficient to justify the fee." (AFL-CIO's Br. at 18.) That would impermissibly shift the burden of proof to the pilots. This Court has repeatedly held that, "***always***, the union bears the burden of proving the proportion of chargeable expenses to total expenses." *Lehnert*, 500 U.S. at 524 (emphasis added) (citing cases). "The nonmember's 'burden' is simply the obligation to make his objection known," *Hudson*, 475 U.S. at 306 n.16, in general terms. *See Abood*, 431 U.S. at 241 & n.42. Moreover, the AFL-CIO does not explain how nonmembers can specify which union evidence is insufficient if they have not had discovery.



"[R]ules of evidence that treat hearsay with skepticism, and discovery procedures that allow litigants to probe their adversaries' cases in depth prior to hearing," are particulary necessary in challenging the misuse of agency fees. *See Bromley*, 82 F.3d at 693-94. *Lehnert* requires "a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees." 500 U.S. at 519. These are "difficult" mixed questions of fact and law that cannot be determined without "factual concreteness and adversary presentation" on an "evidentiary record" providing "specificity in the description of [the] activities." *Abood*, 431 U.S. at 236 & n.33. And, the union alone possesses the facts and records that would show whether its calculations satisfy the constitutional test for chargeability and its burden of proof. *See, e.g., Hudson*, 475 U.S. at 306.

Contrary to the NEA's implication, the "amount of financial disclosure a union must provide to a non-member to enable her to decide whether or not to object . . . is not necessarily sufficient to determine the propriety of the agency fee." *Tierney v. City of Toledo*, 917 F.2d 927, 938 n.9 (6th Cir. 1990). That is so, because *Hudson* requires advance disclosure of only "the major categories of expenses." 475 U.S. at 307 n.18. Here, ALPA's SGNE, while it disclosed some 1200 "project codes," merely identified each code with a short, cryptic title which seldom showed the nature of the activity involved. (*See* Pet. App. at 118a-57a.)

Thus, because the pilots were denied discovery, and even advance identification of ALPA's witnesses and exhibits, and could not compel the testimony of union witnesses or production of union documents at the hearing under ALPA's procedure, they were unable effectively to cross-examine, impeach, or rebut ALPA's case. Moreover, that case consisted solely of hearsay: "summaries of documents that were not presented in evidence and had not been made available for inspection by [the] dissenters prior to the arbitration hearing," *Bromley*, 82 F.3d at 693, and general, self-serving testimony of ALPA employees. *See supra* pp. 5-6 & note 2.

In short, the pilots and their attorney were mere spectators at a "show trial." Such a proceeding neither significantly reduces the need for discovery in the subsequent court action nor creates a record of the type that can be relied upon to decide a motion for summary judgment. *See Bromley*, 82 F.3d at 693-94.

ALPA relies on the fact that "*Hudson* itself states that 'a full-dress administrative hearing, with evidentiary safeguards' is not required." (ALPA's Br. at 24 (quoting 475 U.S. at 308 n.21).) However, *Hudson* merely says that "a full-dress administrative hearing . . . is [not] part of the 'constitutional minimum'" for the initial ***collection*** of agency fees. 475 U.S. at 308 n.21. It does not hold that discovery and evidentiary safeguards are unnecessary to protect nonmembers' rights where, after the fees have been collected, arbitration is asserted as a prerequisite to or substitute for "ordinary judicial remedies," *id.* at 307 n.20.

ALPA also argues that this Court has rejected the lack of rules of evidence and "broad discovery" "as a basis for not enforcing an agreement to arbitrate federal statutory claims, even when the arbitration . . . is a binding substitute for court litigation." (ALPA's Br. at 24.) ALPA cites *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). However, *Gilmer*, unlike this, was a case in which the plaintiff individually agreed to arbitrate his statutory claims. *Id.* at 23. "By ***agreeing*** to arbitrate a statutory claim, ***a party . . . trades*** the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added). That a party should be held to his agreement to waive the rules of evidence and civil procedure does not mean that a person with a statutory or constitutional claim can be ***forced*** to give up those procedural protections.

*Alexander v. Gardner-Denver Co.* and *McDonald v. City of West Branch* held that arbitration "cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights" where an employee has not



voluntarily waived his statutory cause of action. *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984); *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974).[12] One reason given for that holding was that "arbitral factfinding is generally not equivalent to judicial factfinding," because "'the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery [and] compulsory process . . . are often severely limited or unavailable.'" *McDonald*, 466 U.S. at 291 (quoting *Gardner-Denver*, 415 U.S. at 57-58).

Although *Gilmer* found these concerns "undermined" where there is an agreement to arbitrate statutory claims, *Gilmer* distinguished *McDonald* and *Gardner-Denver* because "those cases did not involve the enforceability of an agreement to arbitrate statutory claims." 500 U.S. at 33-35 & n.5. By so distinguishing the *Gardner-Denver* line of cases, *Gilmer* indicated those cases' continuing applicability where, as here, there is no agreement to arbitrate statutory claims. *See, e.g., Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 523-27 (11th Cir. 1997); *see also Livadas v. Bradshaw*, 512 U.S. 107, 126 n.21 (1994) ("*Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander*").[13]

*Gardner-Denver* and *McDonald* also found arbitration inadequate to protect federal statutory and constitutional rights because "an arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'" *McDonald*, 466 U.S. at 290 (quoting *Gardner-Denver*, 415 U.S. at 57). That factor also exists here and shows that decisions of "arbitrators" under

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[12] Both cases also recognized that, despite the availability of arbitration, employees could "elect to bypass arbitration and institute a lawsuit." *Gardner-Denver*, 415 U.S. at 59; *accord McDonald*, 466 U.S. at 292 n.11.

[13] *Gilmer* also is distinguishable from this case, because the arbitration procedures there did "allow for document production, information requests, depositions, and subpoenas." 500 U.S. at 31.

ALPA's scheme are unlikely to assist the courts in deciding the statutory and First-Amendment questions presented in agency-fee cases. *See Bromley*, 82 F.3d at 693.

Besides his decision, the only record evidence here as to the expertise of "arbitrator" Aronin is that the AAA appoints "an arbitrator from a special panel of arbitrators experienced in employment relations." (J.A. at 88, ¶ 3.) However, labor arbitrators "may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions." *McDonald*, 466 U.S. at 290.

A labor arbitrator's lack of necessary expertise is particularly likely in considering "difficult line-drawing questions," *Abood*, 431 U.S. at 236, whether union activities may be charged to nonmembers, including whether they "significantly add to the burdening of free speech that is inherent in the allowance of an agency . . . shop," *Lehnert*, 500 U.S. at 519. As Henry P. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 523 (1970) (cited approvingly in *Hudson*, 475 U.S. at 303 n.12), said about a labor board, a labor arbitrator "when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests." *Cf. Breininger*, 493 U.S. at 74 (doubting any special NLRB expertise in unfair-representation cases).

Insensitivity to First-Amendment interests is evident here from Aronin's decision. Aronin upheld ALPA's treatment of lobbying concerning federal air safety regulations as chargeable, (Pet. App. at 108a), despite the fact that, as the court of appeals said, "it is hard to imagine [nonmembers' First Amendment-type] interests more clearly placed in jeopardy than when the union uses the dissidents' money to pursue political objectives" such as air-safety regulations. (*Id.* at 14a.)

Thus, as in *McCarthy*, that the nonjudicial decisionmaker here "does not bring to bear any special expertise on the type of issue presented" militates against requiring exhaustion. *See* 503



U.S. at 155. At the least, as in *Patsy*, exhaustion should not be judicially imposed, because "there is debate over whether the specialization of federal courts in constitutional law is more important than the specialization of administrative agencies in their areas of expertise." 457 U.S. at 513 n.15.

### E. Exhaustion Will Unduly Prejudice Nonmembers.

Finally, ALPA contends that the pilots' interests will not be unduly prejudiced by an exhaustion requirement, because the "time required to complete an agency-fee arbitration is generally not great," "the challengers are protected . . . by the escrow requirement imposed by *Hudson*," and the "remedial authority of the arbitrator is as broad as a court's." (ALPA's Br. at 23.) These contentions are all disingenuous.

- **Time:** "[U]ndue prejudice to subsequent assertion of a court action" "may result . . . from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 146-47. A party cannot be required to exhaust procedures that do not place a reasonable time limit on the consideration of claims. *See Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989).

Here, the time frame is indefinite, because neither ALPA's procedure nor the AAA's rules contains deadlines for the initiation of "arbitration" by ALPA and the completion of hearings. (*See* J.A. at 69-70, 88-94.) In this case, the pilots sent their objections to ALPA in August 1993. The final "arbitration" decision was not issued until September 30, 1994, more than a year later. (*Compare* J.A. at 71-78 *with* Pet. App. at 158a-61a.)

Such a lengthy period not only unreasonably delays judicial resolution of these cases, but might even more seriously prejudice the pilots. The limitations period for unfair representation actions is six months. *DelCostello v. Teamsters*, 462 U.S. 151 (1983); *Lancaster v. ALPA*, 76 F.3d 1509, 1527 (10th Cir. 1996). Thus, "[u]nless the doctrine that statutes of limitations are

not tolled pending exhaustion" is inapplicable in these cases, as the Tenth Circuit held in *Lancaster*'s specific circumstances, 76 F.3d at 1528, a judicially imposed exhaustion requirement might effectively prevent nonmembers from ever receiving judicial consideration of their claims. *See Patsy*, 457 U.S. at 514 n.17.

Moreover, ALPA's procedure requires objecting pilots to request "arbitration" within thirty days of the SGNE's mailing, plus "a reasonable additional time for receipt." (J.A. at 69, 79.) Thus, were exhaustion required, ALPA's scheme would further prejudice the pilots by drastically truncating the limitations period from six months to about thirty days.[14] That a nonjudicial procedure imposes a short filing deadline "that create[s] a high risk of forfeiture of a claim for failure to comply" "counsel[s] strongly against exhaustion as a prerequisite to the filing of a federal-court action." *McCarthy*, 503 U.S. at 152-53; *cf. DelCostello*, 462 U.S. at 165-66 (a ninety-day arbitration limitations period is too short for unfair representation claims).

- **Escrow:** ALPA's scheme does not ***completely*** "avoid the risk that dissenters' funds may be used temporarily for an improper purpose," *Hudson*, 475 U.S. at 305. ALPA does not escrow challengers' ***entire*** agency fees. During a given calendar year, it escrows only "an amount equal to 1.5 times [its] estimate of its total agency fee rebate obligation for that year." (J.A. at 67-68.) When a pilot challenges ALPA's calculation of the reduced fee, it escrows "pending the outcome of the arbitration" only "the portion of the pilot's agency fee that ALPA determines to be reasonably in dispute." (*Id.* at 69.) Thus, ALPA has the use of part of challengers' agency fees at all times, and it is possible that some part may be spent for lawfully nonchargeable purposes. "The amount at stake for each individual dissenter does not diminish this concern." *Hudson*, 475 U.S. at 305.

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[14] Most unions have similarly short filing deadlines in their agency-fee objection procedures. *See, e.g., Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116-17 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).



Moreover, even if all portions of the fees for a particular year ultimately found to be nonchargeable by the "arbitrator" happen to have been escrowed, challengers have been deprived for a substantial time of the use for their own purposes of that portion of their monies.[15] That is not merely a deprivation of property, however. As Justice Brennan said in *Elrod v. Burns*, a likely consequence of the deprivation is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." 427 U.S. 347, 355-56 (1976) (plurality opinion); *accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980); *see Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970).

- **Remedial Authority.** An "administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'" One such circumstance is where the agency may "lack authority to grant the relief requested." *McCarthy*, 503 U.S. at 147-48 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)); *see also Clayton*, 451 U.S. at 693 ("where an aggrieved employee cannot obtain . . . the substantive relief he seeks," exhaustion "would delay judicial consideration . . . , but would not eliminate it").

Contrary to ALPA's assertion, there is serious doubt that the remedial authority of its "arbitrator is as broad as a court's," (ALPA's Br. at 23.) The RLA "contemplates resort to the usual judicial remedies of ***injunction*** and award of damages when appropriate for breach of th[e] duty" of fair representation. *Steele*, 323 U.S. at 207 (emphasis added). Thus, if a court finds that a union charged for an activity that is lawfully noncharge-

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[15] In this case, collection began in January 1992, but it was not until September 30, 1994, that the "arbitrator" found that 1.5% of the 1992 dues amount had been unlawfully collected from the pilots. (Pet. App. at 161a.) That, of course, was in addition to the amounts that ALPA earlier conceded it had collected unlawfully: 11% of dues in the first six months of 1992 and 2% in the last six months. (*See id.* at 2a.)

able, it can not only award damages, but also can enjoin the union from charging objecting nonmembers for that activity in the future. The pilots requested that relief here. (J.A. at 48.)

However, ALPA's "arbitrator" cannot provide prospective relief, because his authority derives from ALPA's policy. It authorizes him only to require restitution of the part of the fees for the particular year before him that he finds was collected unlawfully. (*See* J.A. at 69-70; Pet. App. at 114a-15a); *cf. Brosterhous v. State Bar*, 906 P.2d 1242, 1253 (Cal. 1995) (the arbitrator under a Bar's objection procedure "could not grant declaratory relief or enjoin future violations . . . or make any ruling that would bind the State Bar in the future").

In sum, policy considerations do not justify an exhaustion requirement here, and such a requirement would unduly prejudice nonmembers in all respects that ALPA says it would not.

## IV. Because the Impartial Decisionmaker Procedure Is a Review Procedure, Requiring Its Use Is an Exhaustion Requirement. Moreover, It Is One That Would Unlawfully Infringe Nonmembers' Right Not to Associate.

Presumably because they find little support for their position in *Hudson* and exhaustion cases, the NEA, explicitly, and ALPA and the AFL-CIO, implicitly, argue that they are not attempting to impose an exhaustion requirement at all. Rather, they say, "a nonmember may not bypass a union's agency fee arbitration process and then mount a First Amendment challenge to the fee," because under *Hudson* "no First Amendment injury accrues unless and until the arbitrator frees the union to spend money over the nonmember's objection." (NEA's Br. at 18-19; *see* ALPA's Br. at 19 n.9; AFL-CIO's Br. at 13-14.)

*Williamson County Regional Planning Commission v. Hamilton Bank*, a case the NEA cites for this inventive argument, shows that ALPA and its *amici* confuse two "conceptually distinct" questions: "whether administrative remedies must be



exhausted" and "whether an administrative action must be final before it is judicially reviewable," 473 U.S. 172, 192 (1985).

> [T]he finality requirement is concerned with whether ***the initial decisionmaker*** has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek ***review of an adverse decision and obtain a remedy*** if the decision is found to be unlawful or otherwise inappropriate.

*Id.* at 193 (emphasis added).

Here, ALPA is the "initial decisionmaker" and "arrive[s] at a definitive position" on the chargeability issue. When ALPA distributes its SGNE, it has finally determined what percentage of dues it will seize from nonmembers who object to paying for nonbargaining activities and will spend, despite those objections, if they do not seek review of its determination. The "impartial decisionmaker" does not participate in that decision. And, that decision "inflicts an actual, concrete injury." Dues are collected from the nonmembers based on ALPA's determination, upon pain of discharge for nonpayment, thus depriving the pilots of possession of part of their wages.

On the other hand, *Hudson* describes the "impartial decisionmaker" procedure as a "review procedure" and a "remedy." 475 U.S. at 307-08 & nn.19-21. And so it is in practice. The "arbitrator" determines whether ALPA validly calculated the agency fee charged objectors and orders a remedy: restitution of any portion of the fee that he finds was not lawfully collected. (*See* J.A. at 69-70; Pet. App. at 114a-15a.)

Therefore, *Williamson County* confirms that the court of appeals correctly held that exhaustion of ALPA's "arbitration" procedure is not required. The claim in that case was not ripe, because the property owner had not asked the Planning Commis-

sion to grant a variance and, thus, the Commission had not yet made "a conclusive determination . . . whether it would allow [the property owner] to develop the subdivision in the manner [the owner] proposed." 473 U.S. at 193. In short, in contrast to this case, there was no taking yet.

However, in *Williamson County*, there were two other procedures, similar to the "impartial decisionmaker" procedure here, that the Court held need ***not*** be used before the claim was ripe for judicial determination. The "State provide[d] procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities." The Court held that the property owner "would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial." It also held that the owner "would not be required to appeal the [Planning] Commission's rejection of [a] preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking." *Id.*[16]

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[16] The other cases the NEA cites are wholly inapposite. *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953), held merely that government can require the obtaining of a license for the use of public property if the licensing agency makes only ministerial time, place, and manner determinations. *See Poulos*, 345 U.S. at 402-05; *Cox*, 312 U.S. at 575-76. The public ***owns*** the public streets and parks and, as proprietor, may make reasonable regulations for their use. ALPA has no authority as against nonmembers that justifies requiring them to seek a license from it through its "arbitration" scheme as a precondition to asserting in court their constitutional and statutory right to get back their own money. Moreover, *Poulos* recognized that government cannot require the obtaining of a license as a precondition to exercising First-Amendment rights where the licensing agency—like the "arbitrator" here—has discretion to make content-based determinations. *See* 345 U.S. at 403 n.9, 412-14.

(continued...)



Moreover, the unions' "ripeness" argument misrepresents *Hudson*. A First-Amendment violation, or breach of the duty of fair representation, occurs when a union spends objecting nonmembers' agency fees on nonbargaining activities. However, such a violation, and a violation of the right not to be deprived of property without due process, ***also*** occurs when a union ***collects*** agency fees without having in place a procedure that satisfies the Constitution, or the duty of fair representation, in all respects, even if the union escrows all contested fees.[17] *See, e.g., Weaver v. University of Cincinnati*, 942 F.2d 1039, 1045-46 (6th Cir. 1991).

*Hudson* prescribed "constitutional requirements for the Union's ***collection*** of agency fees." 475 U.S. at 310 (emphasis added). These requirements were not imposed merely to prevent improper spending, as the unions argue. They also were imposed to "provide the protections necessary for any ***deprivation of property***" and "to minimize both the impingement [of the agency shop itself on nonmembers' First-Amendment interests] and the burden" of objection. *Id.* at 304 n.13, 309 (emphasis added).

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[16] (...continued)

*Times Film Corp. v. City of Chicago* held only that a permit may be required to protect the public "against the dangers of obscenity in the public exhibition of motion pictures," because "'obscenity is not within the area of constitutionally protected speech,'" and motion pictures are "not 'necessarily subject to the precise rules governing any other particular method of expression.'" 365 U.S. 43, 49-50 (1961) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). Here, in contrast, the collection of agency fees even for bargaining purposes indisputably infringes on First-Amendment interests. *See Hudson*, 475 U.S. at 301 n.8, 307 & n.20; *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222 (opinion of the Court), 255 (Powell, J., concurring). Nor does this case concern motion pictures.

[17] This Court recognized the procedural due process component of the duty of fair representation in *Steele*, 323 U.S. at 204.

The Court explicitly rejected the argument, now made here by ALPA and its *amici*, "that because a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," there is no constitutional violation. The Court held that the *Hudson* "plaintiffs established a constitutional violation," because the union's procedure "remains flawed in two [other] respects": the lack of "an adequate explanation for the advance reduction of dues" and "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309 & n.22.

*Hudson* also reiterated the Court's earlier holding in the RLA cases and *Abood* that the "nonmember's 'burden' is ***simply*** the obligation to make his objection known." *Id.* at 306 n.16 (emphasis added). Those earlier cases also held that an objection may be made for the first time "in [a] complaint filed in [a civil] action." *Railway Clerks v. Allen*, 373 U.S. 113, 119 n.6 (1963); *accord Abood*, 431 U.S. at 239 & n.39. And, *Hudson* emphasized that the union has "a responsibility to provide procedures that ***minimize*** th[e] impingement [of the agency shop on First-Amendment rights] and that ***facilitate*** a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (emphasis added).

It necessarily follows that a union's procedure is invalid—and a claim that the union has unlawfully collected agency fees is ripe for judicial determination—where the union's procedure fails to include one of the three required *Hudson* procedural safeguards (*i.e.*, notice, independent decisionmaker, and escrow) ***or*** includes some other element that imposes an impermissible condition on nonmembers' exercise of their right to challenge its calculation of lawfully chargeable expenses.

For example, under the NLRA and RLA, "the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n.16 (1985); *see Beck*, 487 U.S. at 744-45; *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 235-38 (1956). Thus, clearly, a union could not lawfully condition exercise of the right not to subsidize its nonbargaining



activities, or the right to challenge its calculation of bargaining costs, upon full membership.

Here, ALPA is attempting to condition exercise of both rights on compliance with an aspect of full union membership, use of a union-created remedy, *see, e.g., Neal v. System Bd. of Adjustment*, 348 F.2d 722, 726 (8th Cir. 1965). ALPA has demonstrated no consensual or federal statutory source of authority for that requirement.

Thus, by attempting to include that condition in its procedure, ALPA has invalidated the procedure and infringed on the pilots' statutory and First-Amendment rights by collecting agency fees from them, regardless of whether the procedure otherwise complies with *Hudson*, including its escrow requirement. As the court of appeals held in *Abrams v. Communications Workers*, a union's agency-fee procedure "requiring an objector who challenges the allocation of chargeable and non-chargeable expenses to exhaust Union-provided arbitration violates its duty of fair representation by limiting the choice of forum for the challenge." 59 F.3d 1373, 1382 (D.C. Cir. 1995); *see also Bromley*, 82 F.3d at 694 ("it is [not] constitutional for an agency shop agreement to require objecting employees to exhaust their arbitration remedies before going into court on their constitutional claims"); *Hohe v. Casey*, 956 F.2d 399, 408-09 (3d Cir. 1992) (a state requirement of exhaustion of public-sector union agency-fee procedures "is constitutionally unenforceable").

## CONCLUSION

The court of appeals correctly held that a nonmember "who wishes to bring an action in federal court [to challenge the lawfulness of the amount of an agency fee] is not obliged to proceed first to arbitration, at the union's option." There is "no *legal* basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process," (Pet. App.

at 11a), either in *Hudson* or under the doctrine of exhaustion. The court of appeals' decision should be affirmed.

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# APPENDIX

## United States Constitution, Article III

**Section 1.** The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . .

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## Railway Labor Act, §§ 2, Fourth and Fifth, 45 U.S.C. §§ 152, Fourth and Fifth (1988)

**§ 152. General Duties**

* * * * *

**Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden . . .**

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join

or remain or not to join or remain members of any labor organization. . . .

**Fifth. Agreements to join or not to join labor organizations forbidden**

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization. . . .